

**Challenging Conditions:**  
Chaotic Courtrooms and Crazy Prosecutors

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**Overview**

- o Categories of Prosecutor Bad Acts
  - o The "friendly" prosecutor
  - o The lazy or disorganized prosecutor
  - o The psychotic prosecutor
- o Preparing for War
  - o Keep a record of everything
  - o Ask for help
- o Papering the Problem
  - o File motions
- o If you have to go to trial, be annoying.
  - o Keep making the record
  - o Prepare your objections
  - o Make the objections without apology
  - o Seek higher authority

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**State v. Mickelson - Background**

- o 2015 retrial from previous death sentence.
- o Previous prosecutor elected to District Court judge.
- o Previous trial judge elected to LA Supreme Court.
- o New prosecutor is Dale Cox, who became interim DA, and gained national news notoriety for saying "we need to kill more people" in response to death row exoneration.

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### State v. Mickelson – State's facts

- o 1996 unadjudicated other crime – killing of young mother, mutilating body, hiding it.
- o 2007 instant crime – killing of old man, cutting up body, hiding it.

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### State v. Mickelson – Evidence

- o Defendant is caught in the old man's car, with man's drivers license in his hands. Girlfriend has items from house.
- o Old man's blood is on defendant's farm.
- o Defendant went with girlfriend and third party to cash old man's checks after his death. Both co-defendants snitch.
- o Defendant brings cops to collect old man's body parts.
- o Defendant confesses to everything in great detail. For hours. Multiple times.
- o Defendant calls his mom from jail and tells her this isn't the only person he's killed. She says, "I know, pumpkin."

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### Dale Cox Pre-Trial

- o Became acting DA shortly before trial, and indicated that he was running for the seat.
- o Glenn Ford is exonerated and released from prison. Prosecutor Marty Shroud publicly apologizes.
- o Cox says the system worked, he isn't in the compassion game and neither are defense attorneys, and we should "kill more people."
- o This does not go unnoticed by the national media.

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# Collecting the Evidence

## ◦ Quotes to media from all outlets.

We talked about Glenn Ford case. Cox, who's continuing to seek death penalty in cases now, said, "I think we need to kill more people."

Crime has risen, he said. "We're not considered a society anymore, we're a jungle."

Death penalty is not a deterrent, it's an act of revenge on the part of state/society, Cox said. "I think revenge is a legitimate motive."

— Maya Lau (@mayalau) March 24, 2015

Media has "leveled harsh personal criticism of me as an evil racist because of my position on the death penalty."  
These attacks have been personal, savage, false and slanderous."

"I have come to believe that my position on the death penalty is a minority position among the members of this community and would continue to be a source of controversy."

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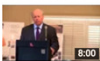
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
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# Collecting the Evidence

## o Speeches to civic groups



Dale Cox June 3 2015 Addressing New Yorker Article of Rachel Aviv  
mmccc50  
342 views



Dale Cox on Policies & Death Penalty Cases of the Caddo Parish DA Office, June 3 2015  
mmccc50  
127 views

"In a period of one generation . . . I have seen it go from a 1-shot barroom argument to almost cannibalism."

Without the death penalty "we might as well turn out the lights and go home. Because we have lost any semblance of society."

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## Collecting the Evidence

- Statements to other attorneys, in other cases
- Asking defense counsel to “step outside” to settle an issue during a hearing.
- Throwing pens during hearings.
- Threatening contempt of court charges for defense counsel filing *Batson* motions.

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## What to do about it?

- Begin putting it in your record.
  - Motion to Recuse/Disqualify DA/ADA
  - Motion for Change of Venue, for Gag Order (if DA is talking in press)
  - Motion for Continuance (if there's an upcoming election or a lot of press attention)
  - Motion for Evidentiary Hearing on Prosecutor Bad Acts
- Explore possible sanctions

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## So What? – US Constitution

- Prosecutor is displaying personal animosity towards defense counsel or defendant.
- Prosecutor is advancing personal interest against counsel, defendant, or alleged crime/penalty.
  - Right to Fair Trial
  - Due Process
  - Eighth Amendment – arbitrary considerations in sentencing when comments get to jury pool. *Bush v Gore/Apprendi/Ring* for DA decision on charging
  - Undermines right to effective assistance of counsel, right to present defense when DA attacks defense counsel for doing job.

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## So What? - State Constitution

- Rights usually track US constitution, but remember to cite separately.
- Look for state provisions governing who has the charging decision, who decides maximum punishment for a crime, if there is any oversight of DA.

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## So What? – Ethical Duties

- National District Attorney Association, National Prosecution Standards, 3d ed.

**1-2.1 Standard of Conduct**  
 A prosecutor should conduct himself or herself with a high level of dignity and integrity in all professional relationships, both in and out of court. Appropriate behavior includes, but is not limited to, the following:

- a. A prosecutor should act with candor, good faith, and courtesy in all professional relations.
- b. A prosecutor should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.
- c. A prosecutor should conduct himself or herself with proper restraint and dignity throughout the course of proceedings. Disruptive conduct or excessive argument is always improper.

<http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>

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## So What? – Ethical Duties

- ABA Model Rules of Professional Conduct

**Advocate**  
**Rule 3.8 Special Responsibilities Of A Prosecutor**  
 The prosecutor in a criminal case shall:

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3.8\\_special\\_responsibilities\\_of\\_a\\_prosecutor.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3.8_special_responsibilities_of_a_prosecutor.html)

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## So What? – Ethical Duties

- Check to see if specific conduct violates state professionalism rules.
  - Mississippi: <https://courts.ms.gov/rules-of-professional-conduct/rules-of-professional-conduct.pdf>
  - Louisiana: <http://alagalethics.org/louisiana-rules-of-professional-conduct/>
- Most professionalism rules don't cover the DA/ADA acting unprofessional, but if he starts misrepresenting the facts in court: lack of candor to the tribunal.

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## So What? – State Statutes

- Recusal article for DA/ADA (Louisiana)
 

*Article 680. Grounds for recusation of district attorney*

A district attorney shall be recused when he:  
Has a personal interest in the cause or grand jury proceeding which is in conflict with fair and impartial administration of justice.

La.C.Cr.P. Art. 680(1).
- Interpreted broadly:
 

"[I]t embodies a policy requiring a district attorney's recusal when the situation presented raises questions as to whether the district attorney's ability to fairly and impartially perform his duties has been impaired, *even unconsciously and despite his earnest assertions to the contrary.*"

*State v. King*, 06-2383, (La. 4/27/07); 956 So.2d 562, 567 (emphasis added).

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## So What? – Case law

- *Estes v. Texas*, 381 U.S. 532, 543 (1965):  
"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . To perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14." At 136."

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## So What? – Case law

- *Estes v. Texas*, 381 U.S. 532, 551 (1965):

As Mr. Justice Holmes said in *Patterson v. Colorado*, 205 U.S. 454, 462 (1907):

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

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## So What? – Case law

- There may be a federal right to prevent bad faith prosecutions for the purpose of harassment. *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. La. 1972).

- Relevant to prosecutor threatening attorney or witness with charges.

- Selective prosecution has a very high bar, even to get discovery. Must show discriminatory effect and intent, that similarly situated defendants were treated differently. *United States v. Bass*, 536 U.S. 862 (U.S. 2002)

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## Keep on arguing

- Pre-trial in *Mickelson*, we filed:

- Motion to recuse the interim DA (Cox)

- Attached all media coverage as exhibits

- Motion for change of venue or continuance until after the election

- Updated media coverage, transcripts of speeches, transcripts of other court cases

- All denied, and:

- Judge *sue sponte* declared that we were not allowed to question venire on media coverage of Cox's death penalty views.

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### Then Things Get Weird(er)

- When waiting near elevators after the hearing, Cox passes us and says:  
"You sons of bitches."
- We didn't file an additional motion, since that tone was already in the pleadings from prior instances.
- During the first venire panel, Cox and the judge start questioning panel members about media coverage on the death penalty, Glenn Ford exoneration, and opinions about Cox and judge who denied compensation to Ford.

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### Then Things Get Weird(er)

- Speaking of the media coverage, Cox tells a potential juror:  
"This is a sensitive point with me, I've been slandered and have been receiving death threats."
- So we filed another (2d) motion to recuse.  
◦ See *United States v. Hairston*, 38 Fed. Appx. 884, 886 (4th Cir. 2002) ("a defendant's alleged death threat against a judge may, in some cases, sufficiently raise the specter of partiality to warrant the judge's recusal")
- We asked for an evidentiary hearing to get information on the validity of the death threat claim.

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### New Forms of Misconduct

- During Opening Statements, Cox claims that the defendant did not have a job, and this was a motive for the crime.
- The state's own discovery includes defendant's work record and an interview with his boss saying he was a good worker. The defendant talks about his job during his statements to police.

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## New Forms of Misconduct

- o "Where the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused and to secure a decision influenced by the prejudice so created, a new trial should be granted." *Craft v. State*, 226 Miss. 426, 435, 84 So.2d 531, 535 (1956).
- o Of course, that was the 50s...

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## New Forms of Misconduct

- o *Spicer v. State*, 921 So.2d 292, 318 (Miss. 2006), In order to find reversible error in a prosecutorial comment, the court must determine "(1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights."
- o But it DOES affect federal rights:
  - o *Naupe v. Illinois*, 360 U.S. 264, 269-70 (1959)(Prosecution must correct known false or misleading statements in open court)

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## Why argue the point?

- o Motive was unnecessary with the volume of the state's evidence. The defendant having a job or not wouldn't matter towards a conviction.
- o But it was important to the client.
- o Many, many years of developing the client relationship let us know that he is proud that he had a job he was good at.
- o The trial is a humiliating experience for the client. His mom, son, and friends would hear horrible things he said he did, be crossed by the hostile prosecutor, and hear two doctors talk about his mental illness.

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### How to argue the point

- o Knowing the client meant that we didn't have to ask him to know it was an important issue that we needed to address.
- o Organization of discovery and the entire file, having it on a computer, and having a staff member who can get the documents quickly, was essential.
- o We could pull and cite the exact pages of the discovery given to defense eight years prior.

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### Still Newer Forms of Misconduct

- o After continued objection that state was not correcting the misstatement that defendant was unemployed, Cox...

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**"That's not  
a fucking job!"**

**"Whatever, bitch."**

And then things went downhill...  
Can we have professionalism?

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"Are you fucking kidding me?  
Professionalism after you assholes signed that public pleading of public record, and you're going to stand behind being professional?  
Fuck you. Do you want to go outside right now?"



**Dale Cox**  
as Acting District Attorney  
Caddo Parish, La

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**It gets worse...**

"I want to kill everyone in here. I want to cut their fucking throats. I'm just being honest. If any of them want to go outside we can do it right now."

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**So we kept arguing.**

- o We filed a third motion to recuse. And a second set of writs.
- o In LA, motions to recuse have to be in writing.
- o The team wrote down what we heard as it was happening or shortly after.
- o We got affidavits from court-watchers attesting to what was said off the record and filed them in the record/with the writs.

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### Result of all that paper

- o The judge denied all recusal motions, but did take longer breaks and end earlier than she probably would have.
- o The Supreme Court took days to issue a denial.
- o The case went to penalty phase.

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### Closing Statement Issues

- o Continued referring to facts not in evidence and denigrating defense counsel
- o During penalty closing rebuttal, Cox ended by asking the jury to seek out two CDs of Catholic funeral masses and play them for him, after the trial was over.
  - o Injects arbitrary considerations into trial, in violation of 8<sup>th</sup> amendment.
  - o Louisiana prohibition on reference to religion. La. C.Cr.P. art 770(1), 775.

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### Closing Statement Issues

- o We knew these issues would be coming (except the funeral mass part) because of pre-trial preparation and asking the broader legal community what to watch out for.
  - o It helped that it was a re-trial.
- o During closing, we had a one-page sheet with likely objections and the grounds for the objections.
- o Objections made quietly without standing, and no speaking objections. Judge overruled without argument.

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## Closing Statement Issues

- **References to the Bible and religion. Including D trying to deprive victim's family of a Christian burial.**
  - Injects arbitrary considerations, in violation of Eighth Amendment. Also La. C.Cr.P. art 770- grounds for mistrial 775.
- **Condemning D for exploiting family by having them testify**
  - Turns mitigation into aggravation.
  - Undermines his Eighth Amendment right to present mitigation, and injects arbitrary considerations.
- **Improper speculation that D will have access to drugs in prison, and therefore be a future danger. (State did this before through questions to defense experts and in argument.)**
  - Violates due process, injects arbitrary considerations in violation of the Eighth Amendment.
- **Suggesting D deserves death for unadjudicated killing as well as Old Man.**
  - Injects arbitrary considerations, in violation of Eighth Amendment.
- **Derogatory comments towards the defense in argument or questions.**
  - Undermines the right to effective assistance of counsel, to resent defense, due process, reliable sentencing hearing.

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## Resources used to fight

- **Searchable, organized case file.**
  - Use a discovery log to document what you get, when. And have it at trial.
  - Bate stamp discovery to make it easier to prove it came from the state at a certain time.
- **Established, also searchable and organized, trial notebook with case law and argument.**
  - DevonThink on a Mac. Evernote and OneNote on Win/Mac. At the very least, a folder with text files.
  - Brainstorm issues that may arise and should be researched before trial.

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## Resources used to fight

- **Help from the team/office.**
  - One member of the trial team dealing with the client while the other deals with the state solves many issues.
  - One member who can step out of the courtroom to print documents and file pleadings is sometimes the only way to get it done.

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### Resources used to fight

- **Help from the Defense Community**
  - For capital cases in Louisiana, the Capital Appeals Project and Louisiana Capital Assistance Center are invaluable.
  - Talk to an appellate or PCR attorney to make sure you're preserving the right issues.
  - Keep track of chronic problem prosecutors. CAP and LCAC had files on Cox because of his issues, which saved time.
  - Use outside people to edit, copy, and file writs while you are in court.

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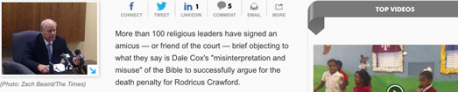
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### Resources used to fight

- **Help from the larger community**
  - Gather media support, if warranted in your case.
  - Has the prosecutor angered other attorneys? Maybe they will be willing to help.
  - Time other attacks to coincide with your efforts. (Ours was fortuitous)

**Clergy: Cox used Bible to advocate for death penalty**

Alexandria Burris, alexandria.burris@threereporttimes.com 12:17 a.m. CDT October 16, 2015




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### Resources used to fight

- **Have as much prep-work done before trial as possible, because new things will arise.**
  - Make a template for motions and writs to use during trial, to speed up their creation. This includes any filing forms that may need bar roll numbers, cell phones, and home addresses.
  - Know how to get minutes from your clerk and a transcript of proceedings during trial, who to ask for it, and how long that will take.

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## Why keep arguing?

- When the motions were denied during trial, we used all resources (thanks CAP, LCAC, and BRCCO!) to file simultaneous writs.
- Continued objections toned Cox down in front of the jury.
- Objections also angered Cox more, so he was more reckless outside jury, and we got more misconduct for the record.
- It split DA resources so they weren't as prepared during trial.
- Perhaps most importantly, it helped our client see that we were fighting for him. He never took the stand in his own defense, and he never inappropriately in front of the jury.

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## Did we really "lose" the issue?

- No motion complaining of the DA's conduct was ever won, and no writ was ever granted.
- By the second week of trial, we had lost three motions and two writs. We still put misconduct on the record. And we continued to seek new types of misconduct. We filed a fourth motion, and two more writs. Which we lost.

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## Twice-convicted killer Eric Mickelson gets life in prison

Posted: Oct 30, 2015 12:30 PM CDT  
Updated: Nov 13, 2015 6:35 PM CST  
By KSLA Staff    [CONTACT](#)  
By Jeff Ferrell    [CONTACT](#)




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JURISPRUDENCETHE LAW, LAWYERS, AND THE COURT.JAN. 6, 2016 5:15 AM

# The Death Penalty's Last Stand

Capital punishment is collapsing under the weight of its own corruption and cruelty.

By Charles Ogletree

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In November, the voters of Caddo Parish elected Judge James Stewart to be the first black district attorney of Caddo Parish. He ran on a reform platform. Days later, Dale Cox resigned from the office.

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